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November 22, 1989

The Honorable Rose Mofford
Governor
Office of the Governor
State Capitol, West Wing
Phoenix, Arizona 85007

Re: I89-097 (R89-096)

Dear Governor Mofford:

You have asked whether the Legislature may constitutionally limit the powers of the Arizona Department of Commerce (Department) to administer the state's oil overcharge fund (fund) pursuant to A.R.S. § 41-1509. We conclude that the Legislature may so limit the powers of the Department. You have asked whether the Joint Legislative Budget Committee (JLBC) may approve or alter expenditures from the fund authorized by the Director of the Department pursuant to A.R.S. § 41-1509(B). We conclude that the JLBC may not. You have asked whether the JLBC may require the Department to file quarterly financial reports concerning the administration of the fund rather than the annual reports required by A.R.S.§ 41-1509(D). We conclude that the law does not require quarterly reports, although the information from such reports may be required by the JLBC through its powers as a legislative committee. Finally, you have asked whether the Legislature may constitutionally appropriate monies from the fund for the Department's expenses of administering the fund under Laws 1989 (1st Reg. Sess.) Ch. 313 (also known as H.B. 2213). We conclude that the legislative appropriation is constitutional. We begin with an explanation of the oil overcharge fund.

In 1982, Congress enacted the "Warner Amendment," Pub. L. No. 97-377, § 155(e)(2), 96 Stat. 1830, 1919-1920 (December 20, 1982), to provide the format for disbursement of petroleum

violation escrow funds to the states.[1] Pursuant to that amendment, each state was to receive funds from the Department of Energy on the condition that the governor of each state give the Department written assurance that the state would disburse the funds as if the funds were received under one of several specified energy conservation programs.[2] On January 18, 1983, Governor Bruce Babbitt, on behalf of the state of Arizona, gave written assurance that the funds which Arizona received would be used according to the terms of the Warner Amendment.

Prior to the establishment of the Department of Commerce, the oil overcharge funds were sent to the Governor and were managed by the Office of Economic Planning and Development

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[1] The escrow funds were the result of settlement agreements and court orders entered into by the Department of Energy and several major oil companies for violations of federal law concerning the pricing of petroleum and petroleum products. Arizona has also received oil overcharge funds from other court settlements such as United States v. Exxon Corporation, Civil Action No. 78-1035 (D.C.D.C. March 25, 1983) and In re the Department of Energy Stripper Well Exemption Litigation. M.D.L. No. 378 (D. C. Kan. July 7, 1986). In 1986, Congress enacted the Petroleum Overcharge Distribution and Restitution Act of 1986 (PODRA) which governs all future overcharge disbursements. Pub. L. No. 99-509, 100 Stat. 1881 (Oct. 8, 1986), codified at 15 U.S.C. §§ 4501 to -4507 (Supp. 1988). Arizona has received at least $20,998,861 in oil overcharge funds pursuant to the Warner Amendment and court settlement agreements.

[2] These programs include: programs under part A of the Energy Conservation and Existing Buildings Act of 1976, 42 U.S.C. 6861 to 6892, programs under part D of title III of the Energy Policy and Conservation Act, 42 U.S.C. 6321 to 6327, programs under the Low Income Home Energy Assistance Act of 1981, 42 U.S.C. 8621 to 8629, programs under the National Energy Extension Service Act, 42 U.S.C. 7001 to 7011, and programs under part G of title III of the Energy Policy and Conservation Act, 42 U.S.C. 6371 to 6371j. See Pub. L. No. 97-377, § 155(e)(2), 96 Stat. 1830, 1919-1920 (1988).

(OEPD) pursuant to A.R.S. § 41-101.01.[3] In 1985, when the Department of Commerce was established, OEPD was transferred to the newly created agency. The Legislature authorized the Department of Commerce to receive, administer and disburse federal energy monies for all energy programs which benefit this state. A.R.S. § 41-1504(A)(9).[4] In 1987, the Legislature passed A.R.S. § 41-1509 which gave the Department of Commerce specific power to oversee the oil overcharge monies. Laws 1987 (1st Reg. Sess.) Ch. 175, § 1. Therefore, the Department of Commerce is the executive agency which is responsible for the administration of the oil overcharge fund as well as all other federal energy monies coming into the state.

The statute in question requires:

> § 41-1509. Oil overcharge fund; source of monies; uses; approval; energy project loans; conditions
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> A. An oil overcharge fund is established in the office of the state treasurer. Monies received by the state as a result of oil overcharge settlements shall be deposited in the fund. At least fifteen per cent of all monies received shall be allocated in accordance with subsections B and C of this section for loans, grants and other purposes which benefit the low income population.

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[3] § 41-101.01. Authority to accept and expend certain funds

The governor, except as otherwise provided by law, is authorized to accept and expend any grants, donations, aids, or other funds received from the federal government or any agency thereof pursuant to Public Law 88-452, the Economic Opportunity Act of 1964, and Public Law 89-136, the Public Works and Economic Development Act of 1965, and any other funds made available to the state through any federal statutes, and in receiving and expending such funds, the governor shall be considered the agency of the state for all the purposes provided by this section.

[4] It is this general grant of statutory authority which authorizes the Department of Commerce to administer the programs on which the Warner Amendment funds and the oil overcharge funds from court orders are required to be spent.

B. The director may grant loans from the principal balance of the oil overcharge fund to assist political subdivisions and nonprofit organizations of this state in funding energy requests. Loans may be granted in accordance with the following provisions in a manner and on terms and conditions prescribed by the director:

1. Loans shall be made only for projects which meet legal requirements imposed on the uses of oil overcharge monies.

2. The director shall assess an administrative fee on each loan to cover the annual cost to this state of administering the loan program. Fees collected shall be deposited in the oil overcharge fund. Subject to legislative appropriation and in accordance with legal requirements, monies in the fund may be expended for the reasonable and necessary costs of administering the fund.

3. Each loan shall be evidenced by a contract between the political subdivision or nonprofit organization and the director, acting on behalf of this state. The contract shall provide for equal annual payments of principal and the annual payment of administrative fees for the term of the loan.

4. Each contract shall provide that the attorney general may commence actions that are necessary to enforce contracts and achieve repayments of loans made pursuant to this section.

C. Monies in the oil overcharge fund may be expended for grants and other purposes which meet the applicable legal requirements imposed on their use upon approval of the joint legislative budget committee.

D. The director shall report annually to the legislature on the status of the oil overcharge fund. The report shall include a financial summary of the oil overcharge fund for the preceding fiscal year with a

> description of the outstanding loans issued. It shall also include a summary of programs and projects for which grants were awarded and monies were expended. The report shall be submitted to the president of the senate and the speaker of the house of representatives no later than December 31 of each year.
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> E. Investment earnings on the unexpended balance of the oil overcharge fund shall be credited to the oil overcharge fund.
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> F. The oil overcharge fund is exempt from the requirements of § 35-190, relating to lapsing of appropriations.

You question whether the Legislature may constitutionally limit the power of the Director to the conditions set forth in A.R.S. § 41-1509.

The Department was created by statute, A.R.S. § 41-1502(A), within the Executive Department of state government under supervision of the Governor, A.R.S. §§ 41-101(A)(1), (2) and -1502(B). The Governor's power over the Department is derived from Ariz. Const. art. V, § 1, which creates the position of Governor and requires that the Governor "shall perform such duties as are prescribed by the Constitution and as may be provided by law." The term "as may be provided by law" means as provided by legislative enactment. Collins v. Krucker, 56 Ariz. 6, 9, 104 P.2d 176, 177 (1940). In reference to the scope of powers of the Governor, the Arizona Court of Appeals has held:

> It is a basic tenet of our system of government that the governor, or executive, has only such powers as are conferred upon him by our constitution or by validly enacted statute.

Litchfield Elementary School District No. 79 v. Babbitt, 125 Ariz. 215, 220, 608 P.2d 792, 797 (App. 1980).

Similarly, the powers of state agencies are controlled according to legislative enactment:

> The general rule in Arizona has long been that the powers and duties of an administrative agency are to be measured by the statute creating them. Kendall v. Malcolm, 98 Ariz. 329, 334, 404 P.2d 414, 417

> (1965); Fleming v. Pima County, 125 Ariz. 523, 611 P.2d 110 (App.1980); Cox v. Pima County Law Enforcement Merit System Council, 27 Ariz.App. 494, 556 P.2d 342 (1976). Thus, "administrative officers and agencies have no common law or inherent powers." 98 Ariz. at 334, 404 P.2d at 417. See Commercial Life Insurance Company v. Wright, 64 Ariz. 129, 166 P.2d 943 (1946); Hunt v. Schilling, 27 Ariz. 1, 229 P. 99 (1924); Johnson v. Betts, 21 Ariz. 365, 188 P. 271 (1920); State v. Board of Supervisors, 14 Ariz. 222, 127 P. 727 (1912).

Ayala v. Hill, 136 Ariz. 88, 90, 664 P.2d 238, 240 (App. 1983). Consequently, the Legislature has power to create or terminate the Department through legislative enactment, Campbell v. Hunt, 18 Ariz. 442, 453, 162 P. 882, 886 (1917), and the Department may only exercise such powers as are provided by its governing legislation, Ayala v. Hill, 136 Ariz. at 90-91, 664 P.2d at 240-241.

We conclude from the above-cited authorities that the Legislature may constitutionally limit the power of the Department by valid legislation. Consequently, the Department may only exercise such powers as are granted by statute and must conduct its business within the limitation of such laws.

In response to your question whether the JLBC may approve or alter expenditures authorized by the Director from the fund, we conclude that it may not. Specifically, we note that A.R.S. § 41-1509(C) provides:

> Monies in the oil overcharge fund may be expended for grants and other purposes which meet the applicable legal requirements imposed on their use upon approval of the joint legislative budget committee.

(Emphasis supplied). We have previously concluded that such a requirement of approval by the JLBC over expenditures exercised by an executive office is unconstitutional as a violation of the separation of powers under Ariz. Const. art. III, the principle of bicameralism under Ariz. Const. art. IV, pt. 2, § 15, and the Presentation Clauses of Ariz. Const. art. IV, pt. 2, § 12 and art. V, § 7. Ariz. Att'y Gen. Ops. I88-077 and I87-107.

In concluding that the portion of A.R.S. § 41-1509(C) which requires JLBC approval is unconstitutional, we must determine whether that portion is severable from the remaining provisions of § 41-1509 relating to the oil overcharge fund. As we stated in Ariz. Atty. Gen. Op. I88-077, "An entire statute should not be declared unconstitutional if constitutional portions can be separated." Accord, Cohen v. State, 121 Ariz 6, 9, 588 P.2d 299, 302 (1978). We also noted that if the remainder of the legislation sensibly expresses the intent of the legislature, the unconstitutional portions are severable. See State v. Book-Cellar, Inc., 139 Ariz. 525, 533, 679 P.2d 548, 556 (App. 1984).

We conclude that the remainder of A.R.S. § 41-1509 creates a sensible, workable scheme for making energy loans according to the uses permitted for oil overcharge monies. The statute establishes the loan program, § 41-1509(A), and prescribes the duties of the Director of the Department with respect to the program, § 41-1509(B). It requires periodic reporting to the legislature of the financial status of the fund, § 41-1509(D), and provides for the continuing accumulation of investment earnings in the fund, § 41-1509(E). Therefore, we cannot conclude that the Legislature intended the program and the fund to cease absent involvement by the JLBC. This means that the director may expend the monies pursuant to the statute without prior approval by the JLBC.

In response to your question whether the JLBC may require the Director to file quarterly financial reports concerning administration of the fund, we conclude that although 41-1509(D) does not require the production of quarterly reports, the JLBC ultimately may require the information for such reports through its fact-finding powers as a legislative committee.

A.R.S. § 41-1272 provides, in pertinent part:

> A. The joint legislative budget committee shall:
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> 1. Ascertain facts and make recommendations to the legislature relating to the state budget, revenues and expenditures of the state, future fiscal needs, the organization and functions of state agencies or divisions and such other matters incident to the above functions as may be provided for by rules and regulations of the joint legislative budget committee.
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> . . . .

B. The joint legislative budget committee may:

1. Make studies, conduct inquiries, investigations and hold hearings.

2. Meet and conduct its business any place within the state during the sessions of the legislature or any recess of the legislature and in the period when the legislature is not in session.

3. Establish subcommittees from the membership of the legislature and assign to such subcommittee any study, inquiry, investigation or hearing with the right to call witnesses which the joint legislative budget committee has authority to undertake.

C. The joint legislative budget committee shall have the powers conferred by law upon legislative committees.

The powers conferred by law upon legislative committees include the power to compel attendance of witnesses, A.R.S. § 41-1153, and to compel production of documents, A.R.S. § 41-1154. These powers may be used to inquire into the conduct of state agencies. Buell v. Superior Court of Maricopa County, 96 Ariz. 62, 66, 391 P.2d 919, 922 (1964).

The powers of the JLBC, as a legislative committee, to ascertain facts relating to the state budget and the organization and functions of state agencies impliedly permit the JLBC to require the Department, by subpoena, to produce testimony or documents relating to the Director's administration of the oil overcharge fund under A.R.S. § 41-1509.[5/] See Preferred Risk Mutual Insurance Co. v. Tank, 146 Ariz. 33, 35, 703 P.2d 580, 582 (App. 1985) ("What is necessarily implied in the statute is as much a part of it as what is expressed.").

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5/Absent service of a subpoena, however, the committee may not punish a failure to obey as legislative contempt. A.R.S. § 41-1153.

We also conclude that the Legislature may constitutionally appropriate monies from the oil overcharge fund for payment of administrative expenses of the fund as long as the state has legal and equitable rights to expend the monies for the purposes of the appropriation.

A.R.S. § 41-1509(B)(2) provides, in pertinent part:

> Subject to legislative appropriation and in accordance with legal requirements, monies in the fund may be expended for the reasonable and necessary costs of administering the fund.

(Emphasis added). When the Legislature provides that administrative expenses of a state agency are "subject to legislative appropriation," such expenses may not be incurred "until funds are specifically appropriated therefor." Cochise County v. Dandoy, 116 Ariz. 53, 57, 567 P.2d 1182, 1186 (1977).

The statute also requires that fund monies only be expended by legislative appropriation "in accordance with legal requirements," meaning in accordance with the "legal requirements placed upon the uses of oil overcharge monies" as required by the preceding subsection, § 41-1509(B)(1). The specific meaning of "legal requirements" as used in § 41-1509(B)(1) explains and limits the meaning of the term as it is used in § 41-1509(B)(2). City of Phoenix v. Superior Court, 139 Ariz. 175, 178, 677 P.2d 1283, 1286 (1984) ("specific statutory provisions will usually control over those that are general."); Southern Pacific Co. v. State Corporation Commission, 39 Ariz. 1, 10-11, 3 P.2d 518, 522 (1931) ("Associated words explain and limit each other."). Consequently, the state has dedicated the funds for the purposes required for receipt of the oil surcharge monies.

The appropriation in question provides as follows:

> H.B. 2213
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> Be it enacted by the Legislature of the State of Arizona:
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> Section 1. Appropriation; purpose; exemption from lapsing
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> A. The sum of one hundred twenty thousand dollars is appropriated in fiscal year 1989-1990 from the oil overcharge fund to the department of commerce to pay

> costs of administering the loan and grant programs authorized by section 41-1509, Arizona Revised Statutes.
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> B. The appropriation made in subsection A of this section is exempt from section 35-190, Arizona Revised Statutes, relating to lapsing of appropriations, except that any monies remaining unexpended or unencumbered on June 30, 1990 shall revert to the oil overcharge fund.

Laws 1989 (1st. Reg. Sess.) Ch. 313.[6/]

Whether the Legislature may control by appropriation act expenditures from the oil overcharge fund for administrative expenses is purely a question of state law. Congress did not specify how the requirements of the Warner Amendment and of PODRA were to be executed according to state law. Consequently, the method must be found in accordance with the Constitution and laws of Arizona. Compare Colorado General Assembly v. Lamm, 738 P.2d 1156, 1169 (Colo. 1987) ("Congress has left the issue of state legislative appropriation of federal block grants for each state to determine. State courts that have considered the issue have relied on the state constitution, historical practices and case law.")

Ariz. Const. art. IX, § 5, provides, in pertinent part, that "[n]o money shall be paid out of the State treasury, except in the manner provided by law." This means that the Legislature

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6/ Oil overcharge funds received under the Warner amendment may not be used to pay administrative costs. See Pub. L. No. 97-377, § 155(f), 96 Stat. 1830, 1920 (1982). However, 5% of the funds received from the M.D.L. No. 378 escrow account established by the United States District Court for the District of Kansas are permitted to be used for administrative costs according to the opinion and order of that Court in In re the Department of Energy Stripper Well Exemption Litigation, July 7, 1986. See 15 U.S.C. § 4505(b), requiring the Department of Energy to monitor the disposition by the states of the Stripper Well funds "including the use of such funds for administrative costs and attorneys fees." We are informed that administrative costs from the oil overcharge fund will be paid only from the Stripper Well funds according to the terms of the District Court Settlement Agreement. The appropriation, therefore, does not appear to violate the terms of the Warner Amendment or PODRA.

has supreme authority over matters of appropriations to ensure that the people's money may not be spent without their consent. Crane v. Frohmiller, 45 Ariz. 490, 495-496, 45 P.2d 955, 958 (1935). However, this power does not extend to all money placed with the state Treasurer. The Arizona Supreme Court has construed Ariz. Const. art. IX, § 5 to apply "'only to such funds, the equitable as well as the legal rights to which are in the state . . . .'" Navajo Tribe v. Arizona Department of Administration, 111 Ariz. 279, 280, 528 P.2d 623, 624 (1975), quoting Button's Estate v. Anderson, 112 Vt. 531, 28 A.2d 404, 410 (1942).

In Navajo Tribe, the Arizona Department of Economic Security (DES) contracted with the Navajo Tribe and others to administer job training and employment projects financed wholly by federal funds. The federal funds were provided by the federal government to the Navajo Tribe on the condition that the Tribe enter into a subcontract with DES whereby that state agency would administer the projects. The contract called for DES to be reimbursed its administrative costs as the Tribe received its federal funds. A controversy arose when the Arizona Department of Administration refused to make the payments that DES had contracted for.

The Department of Administration concluded that the Tribe's payments for DES administrative costs had to be paid into the state general fund under A.R.S. § 35-142(A)("All funds received for and belonging to the state shall be paid into the state treasury and credited to the general fund. . ."). The Department of Administration indicated that the monies could no longer be considered federal funds once they were paid to the state as reimbursement for state administrative expenses. The Department of Administration concluded that when the reimbursement monies went to the general fund, the state (DES) could not receive them without an authorizing appropriation.

The Arizona Supreme Court disagreed in Navajo Tribe, holding that DES was empowered by state law (A.R.S. § 46-137) to pay its administrative expenses "from funds made available for that purpose. . . by the federal government or any of its agencies." 111 Ariz. at 281, 528 P.2d at 625. The court held that no appropriation was necessary under state law.

In concluding that the State's expenditure of the funds in question was not subject to appropriation by the Legislature, the court in Navajo Tribe stated the following:

> Payment of funds into the state treasury does not necessarily vest the state with title to

> those funds. Ross v. Gross, 300 Ky. 337, 188 S.W.2d 475 (1945). Only monies raised by the operation of some general law become public funds. Cyr & Evans Contracting Co. v. Graham, 2 Ariz.App. 196, 407 P.2d 385 (1965). Custodial funds are not state monies. MacManus v. Love, 499 P.2d 609 (Colo.1972). The term "public funds" refers to funds belonging to the state and does not apply to funds for the benefit of contributors for which the state is a mere custodian or conduit. Pensioners Protective Assn. v. Davis, 112 Colo. 535, 150 P.2d 974 (1944). The same is true of the term "general fund." This is made clear by the language of ARS § 35-142, "funds received for and belonging to the state." It is within the power of the legislature to make appropriations relating to state funds, but funds from a purely federal source are not subject to the appropriative power of the legislature. MacManus v. Love, supra.

111 Ariz. at 280-281, 528 P.2d at 624-625.

The Navajo Tribe opinion has been read to mean that the state may not appropriate monies obtained from a purely federal source. See Cochise County v. Dandoy, 116 Ariz. at 56, 567 P.2d at 1185. However, the Navajo Tribe court also indicated that the Legislature's appropriation power extends to monies to which the state has legal and equitable rights. 111 Ariz. at 280, 528 P.2d at 624. Consequently, Navajo Tribe does not address whether the Legislature may exercise its appropriation power over monies from a federal source after the state has acquired both legal and equitable rights to the money.

The meaning of the terms "legal and equitable rights" as used by the court in Navajo Tribe is illustrated in Buttons Estate v. Anderson, 112 Vt. 531, 28 A.2d 404, 410 (1942), quoted by the court in Navajo Tribe, 111 Ariz. at 280, 528 P.2d at 624. In Button's Estate the Governor of Vermont entered into a contract with two attorneys to sue the United States Government for monies expended by Vermont in the prosecution of the War of 1812 against Great Britain. The United States had not yet repaid the monies as apparently required by law. The attorneys

agreed to be paid a fee of 25% from any funds recovered in the lawsuit and, ultimately funds were recovered and paid to the state treasurer of Vermont. The state treasurer refused to pay the contingent fee without an appropriation, as required by Vt. Const. chap. II, § 27 ("no money shall be drawn out of the Treasury, unless first appropriated by act of legislation."). 28 A.2d at 409.

The Supreme Court of Vermont held that, under state law, the attorneys possessed a lien on 25% of the monies received by Vermont, entitling the attorneys to payment from the fund in satisfaction of the lien. 28 A.2d at 410. In discussing the rights of the state and the attorneys, the court commented as follows:

> Although the legal title to the whole fund no doubt is in the State, the petitioners have equitable rights to that portion of the same which represents their fee. This part in all equity and good conscience belongs to them. They have earned it and should receive it. This portion of the fund never legally and equitably belonged to the State as part of its public funds for, at the latest, when received, the lien attached to it and remains upon it so that it is held by the State subject to the same.

Id.

Navajo Tribe and Button's Estate are cases where the state treasurers were merely conduits for payment of monies already designated for payment to a specific payee. The states had no authority over the monies except to pay the agency or person designated to receive the funds. However, the powers granted the State of Arizona over its oil overcharge monies are considerably different from the purely custodial powers discussed above.

The state has been paid the oil overcharge monies with authority to expend the monies for energy needs of Arizona citizens. The state has been granted power to determine which needs should be fulfilled and to prescribe the programs that

will most effectively benefit its citizens.7/ The state has pledged to use the funds within certain broad purposes, and the state has been granted the right to a certain portion of the monies for payment of its administrative costs. We conclude that the state has legal and equitable rights to expend the oil overcharge monies pursuant to A.R.S. § 41-1509 and that the state is not a "mere custodian or conduit" of the monies as in the case of Navajo Tribe.

We also note that a number of state courts have held that their legislatures may appropriate federal funds for the purposes authorized by such federal grants. Legislative Research Commission v. Brown, 664 S.W.2d 907, 929 (Ky. 1984)("The expenditure of money so received is an appropriation which is the function of the General Assembly."); Anderson v. Regan, 53 N.Y.2d 356, 442 N.Y.S.2d 404, 425 N.E.2d 792, 797

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7/The funds which are specifically intended for use according to H.B. 2213, i.e., those granted pursuant to In Re: The Department of Energy Stripper Well Exemption Litigation, M.D.L. No. 378 (D.C. Kan. May 5, 1986), are provided to the state with considerable discretion, as shown by Part II(B)(3)(f)(ii) of the Stripper Well Settlement Agreement:

> Restitutionary Program. Monies received by any State shall be utilized to fund one or more existing or new energy-related programs which are designed to benefit, directly or indirectly, consumers of petroleum products within the State. State governments are familiar with the particular energy needs of their citizens, and therefore they are in the best position to select the specific programs that will most effectively provide restitution to their citizens. In order to provide the flexibility to select from a complement of approved options which will insure consideration of local needs and circumstances, each State will be accorded discretion in selecting specific programs to provide widespread benefits to consumers of petroleum products. . . .

(1981)("When the appropriation rule is bypassed, . . . the Legislature is effectively deprived of its right to participate in the spending decisions of the State, and the balance of power is tipped irretrievably in favor of the executive branch."); Shapp v. Sloan, 391 A.2d 595, 605 (Pa. 1978), Appeal dismissed sub nom. Thornburgh v. Casey, 445 U.S. 942 (1979) ("Within each grant, however, there remains the necessity to establish spending priorities and to allocate the available monies. This is properly a legislative function.")

We also recognize that other states have concluded that the power of appropriation does not extend to federal funds granted to the state, including Colorado, which the Arizona Supreme Court relied on in Navajo Tribe, 111 Ariz. at 281, 528 P.2d at 625.[8/] See McManus v. Love, 499 P.2d 609, 610 (Colo. 1972) (cited by the Court in Navajo Tribe); Colorado General Assembly v. Lamm, 700 P.2d 508, 525 (Colo. 1985) (holding that Colorado's oil overcharge monies may not be subject to appropriation); Opinion of the Justices to the Senate, 375 Mass. 851, 378 N.E.2d 433, 436 (1978) (holding, however, that some federal disbursements to the state might be subject to appropriation, as when reimbursements are made without conditions on expenditure); State ex rel. Sego v. Kirkpatrick, 86 N.M. 359, 524 P.2d 975, 986 (1974) (agreeing with Colorado that the appropriation of federal contributions was "void as an infringement upon the executive function of administration."); State ex rel. Department of Transportation, 646 P.2d 605, 609-610 (Okl. 1982) ("The legislature holds no authority over such [federal] funds.").

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[8/]We note, however, some erosion of this general limitation over the power of appropriation of federal funds under the Colorado Constitution. In Colorado General Assembly v. Lamm, 738 P.2d at 1170, 1172, the Colorado Supreme Court held that its limitation of the power of appropriation did not apply to federal grants requiring state matching funds. The court also held that the Colorado General Assembly could, by appropriation, transfer portions of federal block grants to other block grants where permitted by federal law even though the transfers affected the governor's decisions to allocate such monies. 738 P.2d at 1156, 1173.

The essential difference between the two lines of authority on this issue lies in the constitutional distribution of power between the legislative and executive branches of government as construed by the respective state courts. The courts which have permitted the power of appropriation over federal grants view the legislature's power to appropriate as a control on the executive's power to spend. The state courts which have not permitted appropriation of federal funds give the executive independent authority to determine the manner in which federal funds may be expended. See, e.g., Colorado General Assembly v. Lamm, 700 P.2d at 519, confirming that, under the Colorado Constitution, the Governor has inherent authority to control the allocation of funds and that the legislature may determine only the amount of state funds that may be expended.

However, under the Arizona Constitution the executive department has no inherent powers, and must look to the Constitution and applicable statutes to find authority to act. Litchfield Elementary School District No. 79 v. Babbitt, 125 Ariz. at 220-222, 608 P.2d at 797-799; Ayala v. Hill, 136 Ariz. at 90-91, 664 P.2d at 240-241. The Legislature has chosen to limit the power of the Department to expend only so much of the oil overcharge fund as is made available by Legislative appropriation. To conclude that the Legislature may not so prescribe the powers of the executive department would be to grant the executive inherent authority to determine the allocation and apportionment of funds granted to the state regardless of the wishes of the Legislature. This is not a power which the Constitution has granted to the executive, nor is it a limitation which the Constitution imposes on the Legislature.

We also take note of another constitutional principle, that the Legislature has all powers over state government which are not specifically prohibited by the Arizona Constitution. "'We do not look to the (state) Constitution to determine whether the Legislature is authorized to do an act, but only to see if it is prohibited.'" Earhart v. Frohmiller, 65 Ariz. 221, 225, 178 P.2d 436, 438 (1947), quoting Fitts v. Superior Court of Los Angeles County, 6 Cal. 2d 230, 57 P.2d 510, 512. Accord, Fiesta Mall Venture v. Mecham Recall Committee, 159 Ariz. 371, 375, 767 P.2d 719, 723 (1988); Hart v. Bayless Investment and Trading Co., 86 Ariz. 379, 384, 346 P.2d 1101, 1105 (1959). The Constitution does not prohibit the Legislature from exercising its power of appropriation according to the equitable and legal rights which the state possesses over funds granted to it.

We conclude that the authorities upholding the legislative power of appropriation over federal funds granted to the state are consistent with the principles of the Arizona Constitution that the executive branch has no inherent powers except those specifically granted by the Constitution and by legislative enactment. We find no grant of authority in the Arizona Constitution which gives the executive department exclusive powers over federal grants to the state. Likewise, we conclude that the Constitution does not prohibit the Legislature from limiting the Department to administrative expenditures authorized by appropriation, nor does it prohibit the appropriation of federal funds according to the legal and equitable rights of the state over such funds. Therefore, we conclude that A.R.S. § 41-1509(A)(2) and H.B. 2213, Laws 1989 (1st Reg. Sess.) Ch. 313 are constitutional.

In summary, we conclude that the Legislature constitutionally limited the powers of the Department to administer the state's oil overcharge fund pursuant to A.R.S. § 41-1509. We conclude that the portion of A.R.S. § 41-1509(C) which makes expenditures from the fund subject to approval by the JLBC is unconstitutional and is severable from the remainder of the statute. This means that the director may expend the monies pursuant to the statute without prior approval by the JLBC. We conclude that although the law does not require quarterly reports by the Department to the JLBC, the information for such reports may be required through the JLBC's powers as a legislative committee. Finally, we conclude that the Legislature constitutionally appropriated monies from the oil overcharge fund for payment of expenses of administering the fund.

Sincerely,

Bob Corbin

BOB CORBIN
Attorney General

BC:LPF:bl